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9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11 **WESTERN DIVISION**  
12

13 RAUL LOPEZ-ALVAREZ,  
14 Petitioner,  
15 v.  
16 UNITED STATES OF AMERICA.  
17 Respondent.  
18

Case No. CV 19-3436  
[CR 87-422-JAK-5]

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF MOTION TO  
VACATE SENTENCE UNDER  
28 U.S.C. § 2255**

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## I. INTRODUCTION

More than thirty years ago, Raul Lopez-Alvarez was convicted of offenses stemming from the 1985 kidnappings and murders of DEA Agent Enrique Camarena and DEA informant Alfredo Zavala in Guadalajara, Mexico. More than twenty-five years ago, the Ninth Circuit reversed two of those convictions — one for violent crimes against Zavala, the other for accessory after the fact — for lack of sufficient evidence. But the Ninth Circuit’s decision did not result in an amended judgment until 2005.

This is the first Section 2255 motion challenging that amended judgment. Hence, the Antiterrorism and Effective Death Penalty Act’s gatekeeping requirements for a “second or successive” motion do not apply, and this Court may reach the merits.

On the merits, this Court should vacate Lopez-Alvarez’s sentence and grant a new trial, because the remaining convictions rested in significant part on the false testimony of FBI Agent Michael Malone, the prosecution’s hair and fibers expert at trial. The government has recently acknowledged that Malone’s forensic hair testimony and evidence was false, and that it knew, or should have known, that Malone’s testimony was false at the time of trial.

## II. FACTUAL BACKGROUND

### A. The Evidence at Trial

Lopez-Alvarez was tried in 1988 with two co-defendants, Rene Martin Verdugo-Urquidez (“Verdugo”) and Jesus Felix-Gutierrez. He was convicted of violent crimes in aid of racketeering — the kidnappings and murders of Camarena and Zavala — in violation of 18 U.S.C. §§ 1952B, 2 (Counts One and Two); conspiracy to kidnap a federal agent, in violation of 18 U.S.C. § 1201(c) (Count Three); the substantive offense of kidnapping a federal agent, in violation of 18 U.S.C. §§ 1201(a)(5), 2 (Count Four), felony murder of Camarena in the course of the kidnapping, in violation of 18

1 U.S.C. §§ 1111, 1114 (Count Five), and accessory after the fact, in violation of 18  
2 U.S.C. § 3 (Count Seven).<sup>1</sup> CR 3701.

3 While the trial was lengthy and the evidence was wide-ranging, relatively little of  
4 the testimony and exhibits pertained directly to Lopez-Alvarez's role in the  
5 kidnappings and murders of Camarena and Zavala. The government devoted much of  
6 its presentation to proving the existence of a large-scale international marijuana  
7 trafficking enterprise led by Rafael Caro-Quintero ("Caro"), and to establishing a  
8 motive for the kidnappings and murders — namely, the DEA's successful eradication  
9 and interception efforts that inflicted major losses on Caro's operations in Mexico and  
10 the United States. 4 RT 10-16; Although Caro, the lead defendant, was not on trial,  
11 his presence loomed large: the government sought to prove that co-defendant Verdugo  
12 was Caro's "right-hand man" and "No. 2," and that co-defendant Felix-Gutierrez was a  
13 high-ranking Caro confidant who had taken concrete steps to help Caro escape to Costa  
14 Rica. 4 RT 17-18, 20-23.

15 The evidence against Lopez-Alvarez, by contrast, focused on his alleged  
16 participation in the violent crimes perpetrated against Camarena and Zavala. Indeed, in  
17 its opening statement, the government indicated that Lopez-Alvarez's role "was one of  
18 muscle for the enterprise . . . he participated directly with the torture and interrogation  
19 of Special Agent Camarena." 4 RT 18. The evidence against Lopez-Alvarez consisted  
20 of (1) testimonial and physical evidence regarding the abduction, beating, and  
21 interrogation of Camarena; and (2) Lopez-Alvarez's statements to two witnesses, Abel  
22 Reynoso and Jose Reyes Garcia-Alvarez ("Garcia"). Reynoso was an undercover DEA  
23 agent who recorded Lopez-Alvarez while posing as a criminal in 1987, and Garcia was  
24 a DEA informant who met Lopez-Alvarez in a Mexican prison in late 1985 or early  
25 1986. 11 RT 69-72, 118; 12 RT 32.

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26  
27 <sup>1</sup> Because the accessory-after-the-fact conviction was reversed on direct appeal  
28 for lack of sufficient evidence, *see United States v. Lopez-Alvarez*, 970 F.2d 583, 598  
(9th Cir. 1992). Lopez omits facts relating solely to that charge from this factual  
summary.

1 The government's case against Lopez-Alvarez depended on matching the details  
2 of Lopez-Alvarez's statements — the when, where, and how — to the forensic  
3 evidence and recordings of Camarena's interrogation. 4 RT 18-19. And FBI Agent  
4 Michael Malone, the government's expert hair and fiber examiner whose testimony has  
5 since been largely repudiated, was crucial to making that connection.

### 6 **1. Forensic Evidence**

7 On March 5, 1985, the bodies of Camarena and Zavala were found by the side of  
8 a road approximately 60 miles from Guadalajara. 5 RT 10; 9 RT 113-114. When U.S.  
9 authorities went to a morgue in Zamora, Mexico, to view the bodies, each body had a  
10 set of items associated with it. 5 RT 10-13. A bed sheet, jockey shorts, and rope  
11 bindings were associated with Camarena's body. 5 RT 12. Jeans, underwear, a  
12 sweatshirt, socks, and rope bindings were associated with Zavala's body. 5 RT 12.

13 A forensic pathologist testified that Camarena's cause of death was multiple  
14 blunt force injuries to the head and a perforated injury to the head, and that the manner  
15 of death was homicide. 5 RT 50, 65. The pathologist observed markings consistent  
16 with ligature or rope bindings as well as multiple rib fractures, which were consistent  
17 with postmortem injuries. 5 RT 58, 66, 70.

18 On March 28, 1985, FBI Agent Wayne Oakes collected forensic evidence,  
19 including hair evidence, from a black Grand Marquis sedan that had been recovered by  
20 the Mexican Federal Judicial Police ("MFJP") at a partially completed home on the  
21 outskirts of Guadalajara. 8 RT 136; 9 RT 128-135.

22 Soon thereafter, the DEA received a tip from the Mexican Attorney General's  
23 Office that a home located at 881 Lope de Vega in Guadalajara had been involved in  
24 Camarena's abduction. 8 RT 138. The Lope de Vega property featured a four-  
25 bedroom main residence, grounds containing a tennis court and pool, and a detached  
26 guest house. 10 RT 64-65, 69. On April 12 and April 13, 1985, Agent Malone and  
27 other members of the FBI forensics team conducted a search of the Lope de Vega  
28

1 property. 8 RT 140-141. By the time they arrived, Mexican authorities had already  
2 entered the home. 8 RT 140.

3 Malone testified that he personally vacuumed the guest house, an upstairs  
4 bedroom with a barred window and gun racks, and a Volkswagen parked at Lope de  
5 Vega to obtain forensic evidence for later analysis. 10 RT 74-75, 82-85. He further  
6 testified about the process of microscopic hair comparison analysis, and its use in  
7 determining whether a hair of unknown origin had been forcibly removed, cut off, or  
8 shed naturally. 10 RT 139-154. Malone claimed that if he could isolate fifteen  
9 “individual microscopic characteristics” of an unknown hair, he could match it to a  
10 known hair. 10 RT 143-145; 11 RT 3. He also stated that if he matched a hair to a  
11 particular individual, “the chances of another individual of the same race having hairs  
12 exactly like the person you matched it to is about one in 5,000.” 11 RT 3.

13 Malone then testified to the following “matches” he made between the unknown  
14 hairs and known hair samples:

- 15 • Two hairs recovered from the Mercury Marquis were “consistent with  
16 having originated from Special Agent Camarena” and were “the first two  
17 matches [he] actually made in the case.” 10 RT 147.
  - 18 • Malone “was able to match” two hairs from the Lope de Vega guest house  
19 to Camarena, one of which had been forcibly removed. 10 RT 149-152.
  - 20 • Two hairs from the Volkswagen parked at the Lope de Vega property  
21 “perfectly matched the head hairs of Special Agent Camarena,” and both  
22 had been forcibly removed. 10 RT 153-154.
  - 23 • One hair from bedroom four at Lope de Vega had been forcibly removed  
24 and “perfectly matched the head hairs of Special Agent Camarena.” 10  
25 RT 155.
  - 26 • One unknown hair from the guest house “microscopically matche[d]” the  
27 hairs of co-defendant Verdugo. 10 RT 192.
- 28



- One unknown hair from the guest house was “absolutely indistinguishable” from the head hairs of Sergio Espino-Verdin. 10 RT 190-191. The government pegged Espino-Verdin as Camarena’s primary interrogator. 4 RT 27.

Malone also testified regarding fiber evidence connecting Camarena and Zavala to Lope de Vega. He testified that he collected fiber samples from every carpet at Lope de Vega. 10 RT 77. Malone claimed that, through microscopic fiber analysis, he could determine the type of source fabric and whether an unknown fiber is “consistent with” a known carpet sample. 10 RT 163-164. In addition, Malone testified that he could obtain a “spectral fingerprint” of a given fiber by using a microspectrophotometer machine. 10 RT 164.

- Carpet fibers from the sheet located with Camarena’s body “could have originated from” multiple rooms in the main house at Lope de Vega. 10 RT 167.
- Carpet fibers on Camarena’s adhesive blindfold were consistent with multiple rooms in the main house at Lope de Vega. 10 RT 168-170, 174.
- The ropes associated with Camarena’s body were consistent with rope found by Mexican authorities at Lope de Vega. 10 RT 183.
- The sheet found with Camarena’s body “was consistent with coming from the same set” of linens as two pillowcases from Lope de Vega, one collected by Malone and another provided by Mexican authorities. 10 RT 180-181, 186-187.
- Fibers on Zavala’s sweatshirt were “could have come” from carpet fibers from Lope de Vega’s living room and guest house. 10 RT 170-172.

Malone concluded that the forensic evidence not only placed Camarena in the Mercury Marquis, the Volkswagen, and at both houses at Lope de Vega, and that the hair evidence in particular strongly suggested that Camarena had been held against his will in most of those locations:

1 Based on the fact that I was able to associate Special Agent  
2 Enrique Camarena to 881 Lope de Vega in five different ways  
3 — hair, two types of fibers, fabric and rope, and that each of  
4 these are an independent event, independent of one another, in  
5 my opinion the only possible way this could have happened is  
6 if Special Agent Camarena would have been at 881 Lope de  
7 Vega and the Volkswagen and the Mercury and in a position  
8 with respect to the Volkswagen, the guest house, and bedroom  
9 4 where his hairs could have been forcibly removed.

10 10 RT 189. Malone confirmed this opinion as to Camarena's whereabouts on cross-  
11 examination:

12 Q: You went further than giving an opinion about a match or  
13 no match. Correct?

14 A: In the case of Special Agent Camarena, yes.

15 Q: Yes. And part of your opinion was that either Camarena or  
16 other people were present at a certain location. Correct?

17 A: That's correct.

18 11 RT 40. On redirect, Malone testified that, of the five forensic associations he  
19 mentioned, the hairs were "probably no. 1" in significance. 11 RT 45. Malone also  
20 confirmed that those hairs were collected by him and other members of the FBI  
21 forensics team, and not by Mexican authorities. 11 RT 45-46.

## 22 2. Witness Statements

### 23 a. Abel Reynoso

24 DEA Agent Abel Reynoso testified regarding five meetings he had with Lopez-  
25 Alvarez in the fall of 1987 while working in an undercover capacity. 11 RT 69-72.  
26 Reynoso testified that Lopez-Alvarez admitted working for drug traffickers Ernesto  
27 Fonseca and Caro. 11 RT 80-81. Lopez-Alvarez also told Reynoso about the use of a  
28 black Marquis car in the Camarena kidnapping and showed Reynoso a tape of a popular

1 song about the case called “Band of the Black Marquis.” 11 RT 82. Lopez-Alvarez  
2 commented, “This song was written for us. I was part of this band, from this gang of  
3 individuals who were in the Grand Marquis.” 11 RT 82. Lopez-Alvarez also told  
4 Reynoso that he had worked as a state police officer at the time of Camarena’s death,  
5 and that he had been arrested while riding with two other state police officers in a black  
6 Marquis. 11 RT 87-90, 111-112.

7 Lopez-Alvarez told Reynoso that Camarena had been kidnapped in front of the  
8 U.S. consulate in Guadalajara by abductors bearing Mexican police credentials. 11 RT  
9 83-84. He stated that Camarena was then taken to “his bosses” at a nearby house in  
10 Guadalajara. 11 RT 84. Lopez-Alvarez also stated that Camarena’s interrogation had  
11 been recorded on tape, and that Camarena had been beaten with heated iron pipes. 11  
12 RT 84-85. Lopez-Alvarez gave conflicting stories about Camarena’s death and burial.  
13 11 RT 85-86.

14 On cross-examination, Reynoso acknowledged that he didn’t believe everything  
15 Lopez-Alvarez told him. 11 RT 113. Reynoso also admitted that Lopez-Alvarez did  
16 not give a detailed account of the abduction or beating. 11 RT 128, 136. Some aspects  
17 of Lopez-Alvarez’s account, such as how the abduction transpired or whether Zavala  
18 was shot in the head, turned out to be untrue. 11 RT 129, 145-146. Lopez-Alvarez  
19 never told Reynoso that he personally kidnapped, tortured, interrogated, or killed  
20 Camarena. 11 RT 156-157. In fact, Lopez-Alvarez initially told Reynoso that while  
21 his friend had been involved in the Camarena abduction, he had not been present. 11  
22 RT 157. Rather, he told Reynoso, he had arrived at Caro’s house later with Fonseca, at  
23 a point when Camarena was already close to death, and witnessed an argument between  
24 Fonseca and Caro. 11 RT 156.

25 **b. Jose Reyes Garcia-Alvarez**

26 Jose Reyes Garcia-Alvarez (“Garcia”) was a former MFJP officer and DEA  
27 informant. 12 RT 24, 38-39. He had received approximately \$30,000 for living  
28 expenses from the DEA in the nine months prior to trial. 12 RT 109. As an MFJP

1 officer, Garcia and his supervisors helped protect trucks carrying Caro's loads of  
2 marijuana. 12 RT 24-26. Garcia was imprisoned in Mexico for his role in escorting the  
3 marijuana loads and in cashing a 60-million peso check, reputedly from Caro. 12 RT  
4 27-29. In late 1985 or early 1986, Garcia was incarcerated in a Mexico City prison,  
5 where he met Lopez-Alvarez. 12 RT 30, 32.

6 Garcia testified that, while in prison, Lopez-Alvarez told him that he and his  
7 companions had kidnapped Camarena and taken him in a Volkswagen to Caro's house.  
8 12 RT 34-35. According to Garcia, Lopez-Alvarez said that he saw Camarena being  
9 beaten, and that he and his companions remained at Caro's house for several days  
10 looking after Camarena. 12 RT 36. Lopez-Alvarez also told Garcia of an altercation  
11 between Fonseca and Caro at Caro's house regarding Camarena, during which Fonseca  
12 slapped Caro. 12 RT 36. Lopez-Alvarez told Garcia that he worked for both Caro and  
13 Fonseca. 12 RT 36-37. After Lopez-Alvarez and Garcia were released from prison,  
14 Lopez-Alvarez recounted the same information about Camarena to Garcia at Garcia's  
15 home. 12 RT 37.

### 16 3. Defense Case

17 Lopez-Alvarez's defense was that while he had made the statements reported by  
18 Reynoso, they represented false bluster based on his reading of true-crime magazines  
19 and information he had picked up in prison. 4 RT 56-62. Lopez-Alvarez's mother  
20 testified that, in September 1987, she had seen Lopez-Alvarez reading the April 24,  
21 1985 edition of a magazine called *Alarma*, which contained an article about the  
22 Camarena case. 24 RT 170-175. DEA Agent James Kuykendall testified that the  
23 Camarena case was intensely covered in Mexican magazines, newspapers, radio, and  
24 television, and that the reporting sometimes included summaries of suspects'  
25 declarations. 25 RT 18-22. As for the more directly self-incriminating statements  
26 reported by the informant, Garcia (sometimes referred to as "Reyes Garcia, "Reyes  
27 Garcia-Alvarez," or "Reyes Alvarez"), the defense argued that Garcia was a witness of  
28

1 dubious credibility who had a strong pecuniary motive for providing false evidence to  
2 the DEA. 30 RT 60-70.

#### 3 **4. Closing Argument**

4 In closing argument, the prosecutor characterized “881 Lope de Vega” as “the  
5 residence where the government maintains and the evidence has shown was the site  
6 where Special Agent Camarena and Alfredo Zavala were taken after they were  
7 abducted”; he also referred to the guest house as “the torture chamber.” 28 RT 78.  
8 And when discussing the substantive kidnapping charge in Count Four, the prosecutor  
9 “maintain[ed] that the evidence in this case has proven that Special Agent Camarena  
10 was unlawfully held at 881 Lope de Vega, that he was unlawfully confined against his  
11 will at 881 Lope de Vega . . . .” 28 RT 119.

12 The prosecutor then canvassed the forensic evidence provided by Malone to  
13 paint a picture of Camarena being abducted in the Volkswagen, moved from room to  
14 room within the main house at Lope de Vega, beaten in bedroom four and the guest  
15 house, and removed from the home, deceased, in a burial sheet. 28 RT 137-141.  
16 Malone’s testimony regarding Camarena’s forcibly removed hairs was central to this  
17 narrative. 28 RT 139-140.

18 With respect to Lopez-Alvarez, the prosecutor argued that the admissions  
19 regarding Camarena to Reynoso and Garcia were detailed and true. 28 RT 149-154.  
20 Most of the prosecutor’s closing argument geared specifically to Lopez-Alvarez  
21 involved the separate accessory-after-the-fact charge. 28 RT 154-160.

22 In rebuttal closing, the prosecutor reiterated that the forensics “show[ed] that  
23 Camarena was kept at this particular house,” namely, 881 Lope de Vega. 32 RT 23.  
24 The prosecutor argued that even though Lopez-Alvarez did not identify Lope de Vega  
25 by name, his mention of Caro’s house referred to Lope de Vega. 32 RT 59.

#### 26 **B. Procedural History**

27 On direct appeal, the Ninth Circuit concluded that there was insufficient evidence  
28 to support Lopez-Alvarez’s convictions on Counts Two (violent crimes against Zavala

1 in aid of racketeering) and Seven (accessory after the fact). *United States v. Lopez-*  
2 *Alvarez*, 970 F.2d 583, 598 (9th Cir. 1992). It affirmed this Court's judgment with  
3 respect to the other four counts of conviction. *Id.*

4 This Court did not enter an amended judgment pursuant to the Ninth Circuit's  
5 mandate until over a decade later, on October 26, 2005. CR 2439. Whereas the  
6 original judgment listed six counts of conviction, the amended judgment listed only  
7 four counts of conviction. CR 2439, 3701. And the amended judgment reflected  
8 Lopez-Alvarez's new sentence: 180 years on Counts One, Three, and Four (60 years on  
9 each count, to run consecutively), to run concurrently to life imprisonment on Count  
10 Five, the felony murder conviction.<sup>2</sup> CR 2439. The original judgment had imposed  
11 240 years on Counts One, Two, Three, and Four (60 years on each count, to run  
12 consecutively), to run concurrently to life imprisonment on Count Five and ten years on  
13 Count Seven. CR 3701.

14 Meanwhile, Lopez-Alvarez had filed a Section 2255 motion in this Court on  
15 September 11, 1997, which was denied on July 23, 1999. CR 3851, CR 2374. This  
16 Court denied a certificate of appealability, as did the Ninth Circuit. *See* Case No. CV  
17 97-6776-ER (AIJ), CR 6; C.A. No. 99-56630, Dkt. No. 6.

18 On October 24, 2006, Lopez-Alvarez filed an application for leave to file a  
19 second or successive 28 U.S.C. § 2255 motion. C.A. No. 06-75103, Dkt. No. 1. The  
20 Ninth Circuit denied the application on October 23, 2007. C.A. No. 06-75103, Dkt.  
21 No. 5.

## 22 **C. The 2018 Wong Letter**

23 Lopez-Alvarez was represented by the Federal Public Defender's Office at his  
24 1988 trial. In a letter dated April 27, 2018, attorney Norman Wong, special counsel for  
25 the United States Department of Justice, advised Hilary Potashner, Federal Public  
26

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27 <sup>2</sup> The amended judgment erroneously lists the statutes of conviction for Counts  
28 Four (kidnapping) and Five (felony murder). CR 2439 at 1.

1 Defender for the Central District of California, that it had completed a review of the  
2 hair evidence presented in the trial of Juan Jose Bernabe-Ramirez (“Bernabe”), a co-  
3 defendant who was convicted in a 1990 trial.<sup>3</sup> Ex. A-1. Wong enclosed a letter dated  
4 April 20, 2018, addressed to Nicola T. Hanna, United States Attorney for the Central  
5 District of California, stating that the DOJ and FBI had determined that Malone’s  
6 microscopic hair comparison analysis testimony at the 1990 trial included statements  
7 “that exceeded the limits of science” and were therefore “invalid” in three ways. Ex.  
8 A-3. First, Malone’s testimony falsely “stated or implied that the evidentiary hair could  
9 be associated with a specific individual to the exclusion of all others[.]” Ex. A-3.  
10 Second, Malone falsely “assigned to the positive association a statistical weight or  
11 probability or provided a likelihood that the questioned hair originated from a particular  
12 source, or an opinion as to the likelihood or rareness of the positive association that  
13 could lead the jury to believe that valid statistical weight can be assigned to a  
14 microscopic hair association[.]” Ex. A-3. Third, Malone improperly “cite[d] the  
15 number of cases or hair analyses worked in the laboratory and the number of samples  
16 from different individuals that could not be distinguished from one another as a  
17 predictive value to bolster the conclusion that a hair belongs to a specific individual[.]”  
18 Ex. A-3.

19 Verdugo, as it turns out, had received a similar letter from Wong back in October  
20 2014. Ex. B. In Verdugo’s letter, the FBI had identified the first and second types of  
21 errors in Malone’s trial testimony that rendered it “invalid”: (1) stating or implying that  
22 an unknown hair could be associated with a specific individual to the exclusion of  
23 others; and (2) providing a likelihood that the questioned hair originated from a  
24 particular source, or an opinion as to the likelihood or rareness of the positive  
25 association. Ex. B-3, B-7. Because Verdugo and Lopez-Alvarez were jointly tried, the  
26 same errors taint the government’s case against Lopez-Alvarez.

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27  
28 <sup>3</sup> The Federal Public Defender’s Office had represented Bernabe in prior Section  
2255 proceedings. CR 2344.



### III. ARGUMENT

#### A. Lopez-Alvarez's Section 2255 Motion Is Not Second or Successive.

As a threshold matter, this Court has jurisdiction to consider Lopez-Alvarez's new Section 2255 motion because it is not "second or successive" within the meaning of 28 U.S.C. § 2255(h). Therefore, the gatekeeping conditions in Section 2255(h), which require either "newly discovered evidence" or "a new rule of constitutional law," do not apply, and Lopez-Alvarez need not seek authorization from the Ninth Circuit Court of Appeals before filing this motion. It is true that this Section 2255 motion is second in time; Lopez-Alvarez filed a Section 2255 motion in 1997, which was denied in 1999. CR 3851, 2374. But Lopez-Alvarez's first Section 2255 motion challenged a judgment which is no longer in force. The instant Section 2255 motion, while numerically second, is the first motion to challenge the amended judgment issued on October 26, 2005.

The Supreme Court has explained that the phrase "second or successive" in 28 U.S.C. § 2244 is a "term of art." *Magwood v. Patterson*, 561 U.S. 320, 332 (2010). For that reason, it is "well settled" that "second or successive" "does not simply 'refe[r] to all . . . applications filed second or successively in time[.]'" *Id.* (quoting *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007)). In the context of a habeas petition filed by a state prisoner under 28 U.S.C. § 2254, the Ninth Circuit has held that "the latter of two petitions is not 'second or successive' if there is a 'new judgment intervening between the two habeas petitions.'" *Wentzell v. Neven*, 674 F.3d 1124, 1127 (9th Cir. 2012). Because the amended 2005 judgment intervened between Lopez-Alvarez's first and second 2255 motions, this second-in-time motion is not "second or successive."

The fact that the convictions and sentences on Counts One, Three, Four, and Five — the counts at issue in the new Section 2255 motion — were unaffected by the amended judgment does not make the new motion "second or successive." The Ninth Circuit "treat[s] the judgment of conviction as one unit, rather than separately considering the judgment's components, *i.e.*, treating the conviction and sentence for



1 each count separately.” *Wentzell*, 674 F.3d at 1127-28. In *Wentzell*, the Ninth Circuit  
2 deemed an amended judgment a new judgment for “second or successive” purposes,  
3 even though the sentences on the remaining counts “remained the same as in the  
4 original judgment.” *Id.* at 1125. That is, *Wentzell* “held that an amended judgment  
5 constitutes a new, intervening judgment that renders a subsequent habeas petition not  
6 second or successive *even if* the petition challenges only undisturbed portions of the  
7 original judgment.” *Gonzalez v. Sherman*, 873 F.3d 763, 768 (9th Cir. 2017).

8 Nor does the fact that Lopez-Alvarez sought leave from the Ninth Circuit to file a  
9 second-or-successive motion in 2006, after the amended judgment was issued, render  
10 this Section 2255 motion “second or successive.” Ex. C. Lopez-Alvarez was  
11 proceeding pro se at that time, Ex. C-1, and the denial of his application meant that his  
12 proposed Section 2255 motion postdating the 2005 amended judgment was never filed  
13 in this Court. Further, the cases clarifying the meaning of “second or successive” in the  
14 context of amended judgments — *Magwood*, *Wentzell*, and *Gonzalez* — were decided  
15 after Lopez-Alvarez unsuccessfully sought leave to file a second or successive Section  
16 2255 motion. Now that the Supreme Court and Ninth Circuit have made clear that  
17 Lopez-Alvarez’s new Section 2255 motion is not second or successive, Lopez-Alvarez  
18 should be permitted to file directly in this Court, without obtaining the certification that  
19 Section 2255(h) requires. However, should this Court determine that Section 2255(h)’s  
20 gatekeeping requirements apply, Lopez-Alvarez requests that this filing be transferred  
21 to the Ninth Circuit “in the interests of justice.” *See* Ninth Cir. Advisory Comm. Note  
22 to Cir. Rule 22-3.

23 **B. Lopez-Alvarez Is Entitled to Relief on His *Napue* Claim.**

24 In *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court made clear that the  
25 use of false evidence at a criminal trial can violate due process in two ways. “First, it is  
26 established that a conviction obtained through use of false evidence, known to be such  
27 by representatives of the State, must fall under the Fourteenth Amendment.” *Id.* at 269.  
28 Second, “[t]he same result obtains when the State, although not soliciting false

1 evidence, allows it to go uncorrected when it appears.” *Id.* Finally, “to permit a  
2 conviction based on uncorrected false material evidence to stand is a violation of a  
3 defendant’s due process rights under the Fourteenth Amendment.” *Maxwell v. Roe*,  
4 628 F.3d 486, 507 (9th Cir. 2010). A petitioner can prevail on a *Napue* claim when  
5 “(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should  
6 have known that the testimony was actually false, and (3) the false testimony was  
7 material.” *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc).

8 In the context of Verdugo’s Section 2255 motion, the government has already  
9 conceded that Malone’s testimony was false, and that the government should have  
10 known that the testimony was false at the time of trial. CR 4184 at 16 n.7. Therefore,  
11 the only disputed issue is whether Malone’s false testimony was material to Lopez-  
12 Alvarez’s convictions. Significantly, the materiality standard for *Napue* violations  
13 “requires that the conviction be set aside if there is ‘any reasonable likelihood that the  
14 false testimony *could* have affected the judgment of the jury.’” *Jackson v. Brown*, 513  
15 F.3d 1057, 1076 (9th Cir. 2008) (quoting *Hayes*, 399 F.3d at 985). This “strict standard  
16 of materiality” applies to *Napue* claims “not just because they involve prosecutorial  
17 misconduct, but more importantly because they involve a corruption of the truth-  
18 seeking function of the trial process.” *United States v. Agurs*, 427 U.S. 97, 103 (1976).  
19 “The question is not whether the defendant would more likely than not have received a  
20 different verdict with the evidence, but whether in its absence he received a fair trial,  
21 understood as a trial resulting in a verdict worthy of confidence.” *Hall v. Dir. of*  
22 *Corrections*, 343 F.3d 976, 983-84 (9th Cir. 2003) (per curiam) (quoting *Kyles v.*  
23 *Whitley*, 514 U.S. 419, 434 (1995)). “Indeed, if it is established that the government  
24 knowingly permitted the introduction of false testimony reversal is virtually  
25 automatic.” *Hayes*, 399 F.3d at 978 (internal quotation marks and citation omitted).

26 This Court should grant Lopez-Alvarez’s motion because there is a reasonable  
27 likelihood that Malone’s false testimony could have affected the jury’s verdict on all  
28 counts of conviction. Although Malone’s hair testimony did not directly place Lopez-

1 Alvarez at Lope de Vega, it connected the dots of the government's case nonetheless.  
2 First, the evidence of Camarena's forcibly removed hairs evidence helped establish  
3 Lope de Vega as the location where Camarena was held against his will and treated  
4 violently. Because Lopez-Alvarez had referred to taking Camarena to "Caro's house,"  
5 and Lope de Vega was one of Caro's houses, the government used the hair evidence to  
6 corroborate Lopez-Alvarez's story. Second, the evidence of Camarena's hairs in a  
7 black Mercury Marquis bolstered the government's argument that Lopez-Alvarez was  
8 privy to specific details about Camarena's abduction: Reynoso testified that Lopez-  
9 Alvarez had discussed a song about a black Marquis as the abduction vehicle, and had  
10 mentioned being arrested while riding in a black Marquis. 11 RT 82, 87-90, 111-112.  
11 There was also evidence linking Lopez-Alvarez to another location that Malone  
12 identified as the site of Camarena's forcibly removed hairs — the Volkswagen parked  
13 at Lope de Vega — because Lopez-Alvarez told Garcia that Camarena had been  
14 transported in a Volkswagen. 12 RT 34-35. Without the false testimony linking  
15 Camarena to the locations mentioned by Lopez-Alvarez, his bluster defense would have  
16 been much more compelling.

17 To be sure, the government introduced other forensic evidence to support its  
18 theory that Camarena had been held at Lope de Vega. But this fibers and fabric  
19 evidence was also collected, analyzed, and/or presented by Malone, 10 RT 189, and  
20 therefore suffers from the same credibility problems as the rest of his testimony. And,  
21 compared to the hair evidence, which was couched in precise terms of "perfect"  
22 "match[es]" to specific individuals, the fibers and fabric evidence was framed much  
23 more generally, in terms of "consistency" to various sheets and carpets. In any event,  
24 the government made sure to elicit from Malone that the hair evidence was "probably  
25 no. 1," or first among equals, in terms of forensic significance. 11 RT 45.

26 Further, the remaining evidence against Lopez-Alvarez was far from  
27 overwhelming. No eyewitnesses or untainted forensic evidence, such as fingerprints,  
28 placed either Lopez-Alvarez or Camarena at Lope de Vega, in the black Mercury

1 Marquis, or in the Volkswagen. The defense presented evidence that the Camarena  
2 case was extensively covered by the Mexican press, that Lopez-Alvarez was  
3 imprisoned with others who discussed the case, and that the “details” Lopez-Alvarez  
4 provided were otherwise unconfirmed (as in the case of using heated pipes as a  
5 weapon), common knowledge (as in the case of the dispute between Caro and Fonseca  
6 over Camarena’s treatment), or simply untrue (as in the case of Zavala’s supposed  
7 gunshot wound to the head). Even Agent Reynoso conceded that the Lopez-Alvarez’s  
8 accounts of the abduction and interrogation were not particularly detailed. 11 RT 128,  
9 136. Lopez-Alvarez’s recorded statements to Reynoso were not clearly self-  
10 incriminating: while he alluded to having inside information regarding Camarena’s  
11 kidnapping and interrogation, he did not confess to Reynoso. 11 RT 156-157. While  
12 Lopez-Alvarez’s alleged statements to DEA informant Garcia were more directly  
13 inculpatory, those statements were not recorded, and Garcia’s credibility was highly  
14 suspect. Garcia had admitted to participating in drug trafficking while working as a  
15 Mexican police officer, and his lapses of memory, delay in coming forward, and  
16 financial motivation to assist the DEA cast doubt on his testimony. 12 RT 90-95, 109.

17 Finally, the prosecutor’s statements to the jury and to the court highlight the  
18 materiality of the hair evidence to the case as a whole. The prosecution recognized that  
19 whether Camarena was held at Lope de Vega was a significant fact in dispute.  
20 Therefore, the government argued that it needed multiple charts displaying Malone’s  
21 evidence, because “it strengthens the government’s position that this was the house  
22 where they were taken because we find their hairs in different bedrooms as well and in  
23 the car that was parked on the premises of Lope de Vega.” 27 RT 130. Similarly, the  
24 prosecutor informed the district court that a photograph of the adhesive blindfold with  
25 hair on it should be admitted because Malone’s forensic hair testimony “is a critical  
26 aspect of the government’s case.” 32 RT 66-67. This Court should take the  
27 government at its word as to the materiality of Malone’s evidence and grant relief on  
28 Lopez-Alvarez’s *Napue* claim.

**IV. CONCLUSION**

For the foregoing reasons, Lopez-Alvarez requests that this Court grant his Section 2255 motion, vacate his convictions and sentence, and order a new trial.

Respectfully submitted,

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By /s/ Gia Kim

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